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National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1756

GROENDYKE TRANSPORT, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 438 F. 2d 981. The Board's decision in the unfair labor practice proceeding (Pet. App. A) is reported at 181 NLRB No. 99. Its decision in the related representation proceeding is reported at 171 NLRB No. 193 (A. 8-16).[1]

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[1] "A." refers to the Appendix to the briefs in the court below.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on March 15, 1971, and a petition for rehearing was denied on April 15, 1971 (Pet. App. D). The petition for a writ of certiorari was filed on May 27, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board abused its discretion to determine appropriate bargaining units by establishing separate units for each of the company's trucking terminals and by excluding dispatchers, mechanics, and servicemen from those units.

2. Whether the procedures followed by the Board were proper.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. A18-19. Also relevant is:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

A. The Representation Proceeding

Groendyke Transport, Inc. ("the Company") operates a truck freight line in 48 States and the District of Columbia. The home office is in Enid, Oklahoma, and the Company maintains 26 terminals in Colorado, Kansas, New Mexico, Louisiana, Texas, and Oklahoma (Pet. App. A1; A. 10). In June 1967, the Southern Conference of Teamsters ("the Union") filed representation petitions with the Board's Regional Director, seeking to represent units consisting of drivers and owner-drivers at the Company's terminals in Texas, Oklahoma, and Louisiana (A. 5-6).[2] At the representation hearing, the Union requested a regional unit, or alternatively state-wide units or separate units for each terminal (A. 188-191, 235-236). The Company contended that only a system-wide unit would be appropriate (Pet. App. A1).

With respect to the unit issue, the evidence showed the following: The Company operates a central dispatch system at its home office in Enid. The central dispatch initially allocates business among the terminals (A. 168-169). Drivers who are away from their home terminals are required to call central dispatch for assignments (A. 10). Records regarding all Company employees are maintained at Enid, and all upper level management personnel operate from that office (A. 169-170, 176-177).

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[2] The Union added a newly-opened terminal in Louisiana at the Board hearing (A. 9-10, n. 3; 250-251).

The terminals are autonomous in several respects. After the initial assignment, the terminal deals directly with the customer's needs. The terminals may handle both intrastate and interstate shipments and may ship goods to any state in which the Company is licensed to operate (A. 10; 184, 203-204, 255-256). A manager at each terminal is responsible only to the home office, and travels to Enid with his fellow managers once or twice a year "so that the officials of the Company can find out what is going on" (A. 10; 186, 196). Terminal managers hire employees on a provisional basis, subject to final verification of credentials by the Enid office; promulgate and enforce local work rules, which vary from terminal to terminal; reprimand employees for rules infractions; and, in certain situations, discharge employees (A. 11; 196-198, 210-213, 220-225). They are also responsible for settling grievances at the local level. Although employees may appeal the manager's decision to the Enid Office, they seldom do (A. 11; 223-227).

The Company's terminals are widely scattered geographically (A. 10). Wages differ among the terminals, reflecting such conditions as local Company shipping rates and area competition for personnel with similar skills (A. 11; 166-167, 198-202, 210, 215-216, 256, 263-264). Separate wage adjustments have been made at individual terminals (A. 11; 228-229). There is little employee transfer between terminals; during the 3½ year period immediately preceding the hearing, about seven employees were trans-

ferred from terminals in Texas and Oklahoma to terminals outside those areas (A. 11; 205).

Dispatchers at each terminal receive orders directly from customers and from central dispatch in Enid (A. 13; 194). The terminal dispatcher then schedules the orders for delivery, assigning drivers and equipment according to the priorities he establishes (A. 13; 195-196, 203-204). Most drivers do not have regular customers and are continually assigned by the terminal dispatcher (A. 13; 203-205). He may also reprimand drivers for tardiness (A. 13). The Company does not have a local dispatcher at each terminal, and in those instances the terminal manager does most of the dispatching (A. 187). Driver vacations must be approved by either the dispatcher or the terminal manager (A. 207). Dispatchers, like terminal managers, meet at the Enid office once or twice a year (A. 10; 186).

On this evidence, the Board denied the Union's request for a regional unit or state-wide units. Those units, the Board concluded, had "neither geographic nor administrative cohesiveness" and appeared to be solely based on the extent of the Union's jurisdiction (A. 11-12). It further found that certain factors supported the Company's request for a system-wide unit (A. 12). However, other factors were present: the Company's individual terminals are widely scattered geographically; they are the Company's only operational subdivision; they operate with considerable local autonomy; and they are subject to differing wage arrangements and a minimal number of employee transfers. The Board concluded that, in

these circumstances, single terminal units were also appropriate for bargaining purposes. Accordingly, it granted the Union's alternative request for a separate unit at each of the Company's 15 terminals in Texas, Oklahoma and Louisiana (A. 12). The Board instructed the Regional Director not to conduct an election in any terminal unit until the Union made a sufficient showing of interest in that terminal (A. 12, n. 6).

The Board held that each unit should consist only of drivers and owner-drivers. Over Company objection, it excluded dispatchers because they responsibly directed the work of the drivers, and mechanics and servicemen because they possessed skills and interests substantially different from those of the drivers (A. 13).[3]

The Union won the elections conducted at five of the terminals and lost those conducted at the others (Pet. App. A2-3; A. 51-52). The Company filed ob-

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[3] Mechanics at each terminal are required to have a commercial driver's license as a condition of employment and to drive on occasion. When a mechanic is required to drive, he receives extra pay. Drivers are sometimes required to perform shop work (A. 242-243, 264). They are not to perform any tune-up work on the engines of the Company vehicles, however, because "[t]his is a job for the mechanics" (A. 433-No. 29). In general, the Company "operate[s] [its] shops separately from the Transport operation * * * [j]ust like a commercial garage," with each repair job billed separately (A. 178, 209).

Shop employees other than mechanics ("servicemen") perform such functions as cleaning, washing and greasing trucks, changing oil and refueling, assisting mechanics, and other general shop duties (A. 13; 240-242, 244, 247-251).

jections, reasserting its earlier contention that single-terminal units were inappropriate and that dispatchers, mechanics, and servicemen should not have been excluded (A. 36-44).

After an administrative investigation, the Regional Director recommended that the Company's objections be overruled and that the Union be certified as the exclusive bargaining representative of the employees in the units involved (A. 44-69). The Board overruled the Company's exceptions (Pet. App. A3; A. 76-79) and certified the Union (Pet. App. A3-4; A. 84-85).

B. The Unfair Labor Practice Proceeding

When the Company subsequently refused to bargain, the Union asserted that its action violated Section 8(a)(5) and (1) of the Act (Pet. App. A4; A. 87-94). In the ensuing unfair labor practice proceeding, the Company contended that the Board's certifications were invalid because of the single terminal unit determination and the dispatcher, mechanic, and servicemen exclusions. The Company further alleged that Union representatives had made material misrepresentations of fact and had given items of value to employees to influence their votes (Pet. App. A4-5; A. 95-97).

The Trial Examiner upheld the prior certifications on the basis of the pleadings alone. In accordance with usual Board practice, he treated the previous unit determinations as final, in the absence of newly discovered or previously unavailable evidence or special circumstances (Pet. App. A6-7). Since the Com-

pany offered no explanation for its failure to raise earlier the new contention respecting the Union's alleged misconduct in the campaign (Pet. App. A. 7), it was rejected. The Examiner concluded that the Company refused to bargain with the Union in violation of Section 8(a)(5) and (1). The Board agreed and ordered the Company, *inter alia*, to bargain with the Union on request (Pet. App. A13, 10-12). In a *per curiam* opinion, the court of appeals enforced the Board's order (Pet. App. A14-15).

ARGUMENT

1. Section 9(b) of the Act empowers the Board to decide "in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by the Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *." In this case, the Board determined that single-terminal units of only drivers and owner-drivers were appropriate for the Company's employees. That conclusion necessarily turns on the particular facts presented. The Board's decision was well within its broad discretion on this issue and was sustained by the court below; this essentially factual question does not warrant further review.[4]

[4] Petitioner's challenge to the Board's unit determination here is essentially the same as its unsuccessful challenge to the similar unit determination which the Board made regarding its Denver terminal. See *National Labor Relations Board* v. *Groendyke Transport*, 417 F. 2d 33 (C.A. 10), certiorari denied, 397 U.S. 935.

At all events, the Board's resolution of the issue was correct. The terminals are widely scattered geographically. Only a few employees were transferred among the terminals in three and a half years. Wages vary from terminal to terminal, and separate wage adjustments have been made for individual terminals. The terminal managers, who are directly responsible to the home office, exercise a considerable amount of autonomy in handling day-to-day operations—they establish work rules, discipline employees, and settle grievances. These factors justify fully the Board's finding that single-terminal units are appropriate, despite petitioner's contrary contentions (Pet. 8-12).[5]

Similarly, the Board correctly excluded the dispatchers, mechanics, and servicemen from the units. The Board, on ample evidence, rejected petitioner's contention (Pet. 12-13) that the dispatchers do not responsibly direct the work of the drivers. Petitioner's challenge to the status of the mechanics and

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[5] *National Labor Relations Board* v. *Purity Food Stores, Inc.*, 376 F. 2d 497 (C.A. 1), certiorari denied, 389 U.S. 959; *National Labor Relations Board* v. *Frisch's Big Boy. Ill-Mar, Inc.*, 356 F. 2d 895 (C.A. 7); and *National Labor Relations Board* v. *Solis Theatre Corp.*, 403 F. 2d 381 (C.A. 2), relied on by the Company (Pet. 10-11), are distinguishable. Those cases involved the propriety of single store and similar units within a geographically cohesive chain, in which the courts found no real local autonomy or a frequent interchange of employees. *National Labor Relations Board* v. *Harry T. Campbell Sons' Corp.*, 407 F. 2d 969 (C.A. 4) (Pet. 11), is also inapposite. The court there disapproved carving out a small group of employees from a single large, highly integrated operation.

servicemen (Pet. 14-15) was also properly denied by the Board, on the basis of substantial evidence showing that their skills and interests are different from the drivers.

2. The Company's procedural contentions (Pet. 15-18) are without substance. The claim that it was entitled to a plenary hearing in the unfair labor practice proceeding, in reliance on the *Pepsi-Cola Bottling Co.* case (Pet. 15-16), overlooks that this Court recently rejected the same contention in *Magnesium Casting Co.* v. *National Labor Relations Board*, 401 U.S. 137. The Board's application to this case of the principle formulated in *Mar-Jac Poultry Co.*, 136 NLRB 785,[6] without first holding a formal rule-making proceeding, does not violate *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, as petitioner suggests (Pet. 16-17). In *Wyman-Gordon*, the Court explicitly acknowledged that adjudicated cases properly "serve as vehicles for the formulation of agency policies" and "provide a guide to action that the agency may be expected to take in future cases" (394 U.S. at 765, 766). Finally, the fact that the Board did not articulate the basis for its order in the unfair labor practice proceeding (see Pet. 17-18) comports fully with the settled principle that the representation and unfair labor practice

[6] There, the Board held that, where an employer deprives a certified bargaining representative of the benefits of a substantial portion of the certification year by delaying the start of bargaining, he may be required to bargain with the union beyond expiration of that year in order to provide the union with a full 12 months in which to seek a contract. The Board ordered such an extension here (Pet. App. A10).

proceedings are really one, and hence a single determination of the representation issue, absent special circumstances not present here, is enough. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 158, 161-162; see also *Magnesium Casting Co.* v. *National Labor Relations Board, supra.*

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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